

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 18.02.2019

Judgment Delivered on : 20.03.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH
AND
THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

Original Side Appeal No.13 of 2014
and
Miscellaneous Petition No.1 of 2014

1. K.Kanagasabai
2. Karthick
3. Vithya
4. Sujatha

.. Appellants /Defendants 1 to 4

Versus

R.Sankar

.. Respondent /Plaintiff

Original Side Appeal filed under Order 36 Rule 1 of the Original Side Rules of this Court, read with Clause 15 of the Letters Patent, against the judgment and decree dated 10.12.2012 passed by the learned Single Judge in C.S.No.923 of 2005 on the file of this Court.

For appellants : Mr. T.R. Rajagopalan, Senior Counsel
for Mr. D. Ravichander

For respondent : Mr. M. Chinnasamy

JUDGMENT

R.SUBBIAH, J

This Original Side Appeal has been filed against the judgment and decree dated 10.12.2012 passed by the learned Single Judge in C.S.No.923 of 2005 on the file of this Court, decreeing the said suit filed by the respondent herein by granting the relief of specific performance with a further direction directing the appellants to receive the balance amount of Rs.4,53,000/- which is lying in the Court deposit forthwith and execute and register the sale deed in respect of the suit

schedule property in favour of the respondent, in default the Assistant Registrar, Original Side-I of this Court to execute the sale deed in favour of the plaintiff on behalf of the defendants/appellants.

2. The appellants are the defendants and the respondent herein is the plaintiff in the suit filed before the learned Single Judge. For the sake of convenience, the parties are herein referred to as they are ranked in the suit as plaintiff and defendants.

3. It is the case of the plaintiff that the first defendant is the father of the defendants 2 to 4. The defendants have entered into a sale agreement with the plaintiff with an intention to sell their house property situated at Plot No.111, 4th Street, Door No.5, E.K.Ragava Reddy Colony, Jaffarkhanpet, Chennai-600 015. Subsequently, the defendants 1 to 4 have executed a sale agreement in favour of the plaintiff on 27.05.2005 by confirming the sale consideration of Rs.40 lakhs. According to the plaintiff, on 27.05.2005, while executing the sale agreement, the defendants 1 to 4 have received a sum of Rs.20 lakhs as sale advance from the plaintiff and handed over all the original documents pertaining to the suit property. The defendants 1 to 4 and the plaintiff agreed to complete the sale process within six months from the date of the sale agreement. Further, the plaintiff paid to the defendants 1 to 4 further sale advance of Rs.15,47,000/- on various occasions to meet their family expenses and to settle their debt and last of such amount was received on 07.09.2005. To this effect, the defendants 1 to 4 have made endorsement on the reverse side of the sale agreement and thereby acknowledged the amount paid to them by the plaintiff. Thus, the plaintiff has paid a total sum of Rs.35,47,000/- till 07.09.2005 to the defendants 1 to 4 towards sale consideration. The plaintiff has to pay the balance amount of Rs.4,53,000/- to the defendants 1 to 4. Though the plaintiff called upon the defendants 1 to 4 on several occasions to receive the balance sale amount and execute the sale deed in his favour, the defendants 1 to 4 prolonged the sale process by assigning lame excuse. In fact, the first defendant had also executed a General Power of Attorney supporting the agreement to and in favour of the plaintiff on 31.05.2005, which was registered with the Sub-Registrar, Jaffarkhanpet, vide Document No.486 of 2005 and subsequently, the plaintiff came to understand that the first defendant had cancelled the Power Deed and was attempting to sell the suit property to a third party. The plaintiff was always ready and willing to pay the remaining sale consideration of Rs.4,53,000/- and since the defendants were dragging on the sale proceedings, the plaintiff has filed the present suit for the following reliefs:

(i) to direct the defendants 1 to 4 to execute

the sale deed in favour of the plaintiff after receiving the remaining sale amount of Rs.4,53,000/- from the plaintiff within the stipulated period, otherwise, to appoint a Court Officer to execute the sale deed in favour of the plaintiff, and

(ii) to pass an order of permanent injunction restraining the defendants 1 to 4, their men, agents, representatives, legal heirs or any others from alienating the agreement property.

4. The defendants resisted the suit filed by the plaintiff by filing written statement by contending that the suit transaction had taken place in the year 2005 when the son of the first defendant, namely the second defendant was facing a financial crunch in his business he carried on in United States of America. As the second defendant was in dire need of funds and was unable to discharge his loan availed with the HDFC Bank for his business on the security of the suit property and defaulted in paying the interest to the HDFC Bank for almost one year from 2004-2005 rendering his loan account being treated as Non-Performing Asset, the defendants were constrained to approach the private financiers, like the plaintiff. At that point of time, the defendants 1 and 2 were introduced to the plaintiff and after discussion, the plaintiff offered to give a loan of Rs.40 lakhs repayable with interest at the rate of 24% per annum. Since the amount to be offered as loan was quite high, the plaintiff required the defendants to offer an immovable property as security for the amount to be advanced. The plaintiff was informed by the defendants that the original documents of title were with the HDFC Bank, Mount Road Branch, as security for the loan availed by the second defendant. Thereupon, both the plaintiff and the second defendant had approached the Bank to ascertain the outstanding dues as per their Books of Accounts and was informed by the letter of the Bank, dated 26.05.2005 that a sum of Rs.15,67,066/- was due and payable.

5. It is the further stand of the defendants in the written statement that thereafter, the plaintiff had offered to pay a sum of Rs.25 lakhs initially and then a sum of Rs.15 lakhs after releasing the documents from the Bank. The plaintiff prepared an agreement of sale and a Power of Attorney to be signed by the first defendant, to the effect that the first defendant alone is the owner of the property in question. The first defendant had also signed the agreement of sale dated 27.05.2005 and also the Power of Attorney dated 27.05.2005 as directed by the plaintiff. On the date of the agreement, the defendants had not received Rs.20 lakhs as claimed by the plaintiff. The plaintiff had paid only a sum of Rs.5,60,000/- retaining the balance for the discharge of the loan to the HDFC

Bank and towards interest which he deducted even at the time of advancing the loan. The agreement dated 27.05.2005 had several blanks in regard to various particulars like date, custody of the documents of title, rate of interest, period of performance and the age of the parties. When enquired, the plaintiff assured that since the transaction was only a loan transaction, it was not material as the document in the form of an agreement of sale was obtained only as a security for the loan. Since the plaintiff insisted on a registered document, the Power of Attorney was executed. This method of recording the loan transaction was insisted upon by the plaintiff, as it would save payment of substantial stamp duty if a mortgage deed is executed and registered, which will be debited to the defendants' account. As the defendants had intended to discharge the loan as soon as the other source of funds were cleared for the second defendant, the first defendant signed on dotted lines as dictated by the plaintiff to rescue his son from the financial crunch.

6. It is also stated in the written statement by the defendants that though the suit property belonged to the first defendant alone absolutely, the plaintiff insisted on obtaining the signature of his son and daughters also, to have a binding and threatening effect. Though the son and daughters of the first defendant were not shown as parties to the document, their signatures were also obtained by the plaintiff, which clearly proves beyond doubt that the suit transaction was only a loan transaction. After obtaining the signatures of the defendants in the documents and registering it, the plaintiff and the second defendant had approached the HDFC Bank for discharging the loan and obtained the return of documents. The plaintiff took custody of the original documents, but did not pay any further amount. This was a shock to the defendants and when they approached the plaintiff several times to call off the loan transaction, he was evading the same. On 22.08.2005, when the defendants 1 to 3 met the plaintiff, he agreed to hand over the documents only if they pay a sum of Rs.40 lakhs and had compelled the defendants to make endorsements on the agreement on several dates as though they had received the money on the said dates. The plaintiff had not paid any amount as reflected in the endorsements on the agreement dated 27.05.2005, but only calculated interest at 18% on the sum of Rs.25 lakhs, which works out to Rs.13,07,000/- as on 22.08.2005. The allegation that the plaintiff had made payment of Rs.2,40,000/- on 07.09.2005, was denied by the defendants as false. The defendants had obtained a certified copy of the agreement marked as Ex.P-1 at the time of passing of the ex-parte decree. In the certified copy furnished to the defendant, there is no endorsement of any payment on the reverse page 3 and the entire page on the reverse of page 3 had been scored for want of correction. Hence, the defendants are unable

to find out as to the correctness of the endorsement made on 07.09.2005 as pleaded by the plaintiff and the same is denied by the defendants.

7. According to the defendants, they were shocked by the conduct of the plaintiff and were unable to perceive any solution to the problem, therefore, they proceeded to cancel the Power of Attorney on 23.08.2005 to save the property from being wrongly converted and transferred by the plaintiff and the cancellation of the power of attorney was also duly informed to the plaintiff. However, the plaintiff continued to demand a sum of Rs.40 lakhs as full and final settlement of his dues and therefore, the second defendant has given a complaint to the Commissioner of Police on 22.09.2005 marking a copy to the plaintiff. The plaintiff who wielded a lot of influence with the Police, ensured that no action was taken on the complaint given against him and rushed to the Court by filing this suit in October 2005 only to save himself from criminal prosecution. Thus, the defendants prayed for dismissal of the suit.

8. In order to prove their respective cases, the plaintiff examined himself as P.W.1. Mr. P. Akash, who stood as witness to the agreement of sale dated 27.05.2006 was examined as P.W.2. Exs.P-1 to P-5 were marked on the side of the plaintiff. The first defendant was examined as D.W.1 and Exs.D-1 to D-6 were marked on their side. The learned Single Judge, after analysing the oral and documentary evidence, decreed the suit as prayed for. Challenging the same, the defendants are before this Court by way of this O.S.A.

9. The learned Senior counsel appearing for the appellants/defendants submitted that the transaction between the appellants and the respondent is purely a loan transaction, as the second defendant who was in United States of America during the relevant period had confronted financial crunch. Therefore, in order to save his son, the first defendant availed loan from HDFC Bank by offering the suit property as security. As the second defendant defaulted in paying the interest, the account was declared as NPA. At that point of time, the plaintiff was introduced and after discussion, he offered to give a loan of Rs.40 lakhs with 24% interest, and as the amount was high, he required an immovable property as security. The defendants informed that the original documents were with the HDFC Bank and the plaintiff initially offered to pay a sum of Rs.25 lakhs and then a sum of Rs.15 lakhs after obtaining documents from the Bank. Therefore, the agreement of sale and Power of Attorney were prepared. The agreement had several blanks, which were filled subsequently by the plaintiff, which could be evidenced from the agreement itself. After obtaining signatures of the defendants in the documents, the plaintiff, along with the

defendants, approached the Bank in discharging the loan and obtained the documents. After getting the original documents, the defendants did not pay any further amount. When the defendants met the plaintiff and requested to return the documents, the plaintiff insisted Rs.40 lakhs to be paid, and compelled to make various endorsements. The plaintiff did not pay the sum of Rs.2,40,000/- on 07.09.2005. The entire transaction would show that it is a loan transaction and the suit property is worth more than a Crore of Rupees, even as per the guideline value. Hence, learned Senior Counsel appearing for the appellants submitted that the agreement may not be true.

10. In the above context, learned Senior Counsel appearing for the appellants/defendants invited the attention of this Court to the evidence of P.W.1 and submitted that in the plaint, the plaintiff has averred in paragraph 1 that the documents were handed over to the plaintiff at the time of execution of agreement, whereas in his evidence, P.W.1 has stated that on the date of agreement, the original documents were only agreed to be delivered to him and the first defendant told him that the documents were with the Bank and promised to hand over the documents within two or three days. This contradiction in the evidence of the plaintiff and the averments made in the plaint, shows that the plaintiff has not approached the Court with clean hands.

11. Learned Senior Counsel appearing for the appellants/defendants further submitted that in his examination as P.W.1, the plaintiff has stated that on the date of agreement, after discussion, the sale consideration was fixed at Rs.40 lakhs and the sale deed was agreed to be executed within six months from the date of agreement. Contrary to the same, in his evidence, P.W.1 deposed that on his first visit to the suit property, no terms were fixed and only on the next day, they discussed about the terms and conditions and the agreement was agreed to be entered into on 27.05.2005. Similarly, it is contended by the learned Senior Counsel appearing for the appellants/defendants that with regard to the Power of Attorney, the plaintiff in his plaint has stated that the property stands in the name of the first defendant, but the first defendant had executed the General Power Deed supporting the agreement executed in favour of the plaintiff on 31.05.2005. Contrary to the same, in the plaint, he has stated that on their furnishing the original documents, the plaintiff has asked the first defendant to give Power of Attorney and he does not remember as to when the Power of Attorney was given to him.

12. Similarly, with regard to the readiness and willingness in executing the sale deed, it is submitted by the learned Senior Counsel appearing for the appellants/ defendants that it

is settled law that the plaintiff who seeks the specific performance should always be ready and willing to perform his part of contract, but in this case, P.W.1 had categorically admitted that he did not possess the entire sale consideration on the date of agreement. Therefore, it is clear that the plaintiff did not possess sufficient funds at the time of entering into the agreement. Above all, the plaintiff had admitted in his evidence that when he enquired about the details of the liability on the part of the defendants to the bank, the first defendant informed him that he had to pay Rs.20 lakhs to the Bank and so, he wanted Rs.20 lakhs as advance. Thus, learned Senior Counsel appearing for the appellants/defendants submitted that on a cumulative reading of the evidence of P.W.1 along with the plaint, it would clinchingly establish that the intention of the parties is not for execution of the agreement of sale and the agreement of sale was executed as a security for the loan obtained by the defendants. The learned Single Judge failed to consider all the above aspects, and hence, he prayed for setting aside the impugned judgment of the learned Single Judge.

13. In support of his submissions, learned Senior Counsel appearing for the appellants/defendants relied on the following decisions:

- (i) 2018 (6) CTC 689 (Mad) (Division Bench of this Court) (G.Soundararajan Vs. S.A.Thooyamani).
- (ii) 2017 (5) SCC 178 = 2017 SCC Online SC 157 (Jayakantham and others Vs. Abaykumar).
- (iii) MANU/SC/0173/1987 = AIR 1987 SC 2328 = 1987 Supp (1) SCC 340 (Parkunna Veetill Joseph's Son Mathew Vs. Nedumbara Kuruvila's son and others).
- (iv) 2012 (4) CTC 100 (Madras High Court) (Pappammal Vs. P.Ramasamy), and
- (v) 2016 (6) CTC 225 (Madras High Court) (Rajammal Vs. M.Senbagam).

14. Countering the above submissions made by the learned senior counsel for the appellants/defendants, the learned counsel for the respondent/ plaintiff submitted that the appellants/defendants have made endorsement on the reverse side of the sale agreement and they have not denied the signatures made in those endorsements. It is true that the suit property was under the mortgage with the Bank and the Bank was to take action to bring the property for auction sale, since the due was not paid by the second defendant. In order to avoid the property being brought to auction sale, the defendants approached the plaintiff for sale of their property and entered into a sale agreement with the plaintiff and received the sale consideration of Rs.35,47,000/- from 27.05.2005 to 07.09.2005. Thereafter, a further sum of Rs.4,53,000/- was remitted by the plaintiff representing the balance sale amount during October

2009 pursuant to the ex-parte decree passed by the trial Court. Thus, the plaintiff has paid the entire amount fixed as sale consideration.

15. Learned counsel for the respondent/plaintiff further submitted that D.W.1, the first defendant in his cross-examination, admitted that he and his legal heirs had signed in Ex.P-1 and admitted that he has received the sale amount of Rs.5,60,000/- from the plaintiffs and the Bank loan was obtained by him and his son, and therefore, as per his admission, the sale consideration of Rs.35,47,000/- was paid on or before 07.09.2005 to the defendants and the remaining amount was deposited before the Court. The plaintiff was examined as P.W.1 and broker Mr.Akash who signed the sale agreement as a witness was examined as P.W.2. Both their evidence confirmed that the sale agreement was executed on 27.05.2005 only with an intention to sell the first defendant's house property. In fact, the learned Single Judge has clearly pointed out the contradiction in the evidence of D.W.1 about the manner in which the amount was received from the plaintiff. In fact, on one occasion, he deposed as if he had not received any single pie from the plaintiff and on another, he deposed as if he received Rs.5,60,000/- from the plaintiff and in the other occasion, he deposed as if he received Rs.21,27,066/- from the plaintiff.

16. Learned counsel for the respondent/plaintiff further submitted that for the past 15 years, the appellants/defendants are enjoying the money of Rs.40 lakhs received from the plaintiff. The appellants have clearly admitted that the sale agreement dated 27.05.2005 and the Power Deed dated 31.05.2005 had been executed in favour of the respondent/plaintiff. The first defendant also clearly admitted in his cross-examination dated 25.11.2011 that Ex.P-1 had been captioned as 'agreement for sale'. DW1 further clearly agreed in his cross-examination that Ex.P-1 is not captioned as loan transaction. D.W.1 in his cross-examination admitted that at page 2 of Ex.P1, it is stated that it was the sale agreement entered into between the parties, which shows that it is only sale transaction and there is nothing to disbelieve or misconstrue it to be a loan transaction. Further, D.W.1 admitted in the cross-examination that there are five endorsements of payment in Ex.P-1 sale agreement. All those endorsements were signed by the defendants. The learned Single Judge, by considering the evidence has come to the conclusion that the transaction between the appellants/defendants and the respondent/plaintiff is only sale transaction and correctly decreed the suit.

17. Learned counsel appearing for the respondent/plaintiff further submitted that the appellants/defendants have neglected the suit proceedings from 2005 to 2009 by not filing their

written statement, even though they received the suit summons and filed their vakalat in the year 2005 itself and the suit was decreed on 15.04.2009, after which, the respondent/plaintiff filed Execution Proceedings in E.P.No.1055 of 2009. Even the application filed by the defendants to condone the delay of 173 days in filing the application to set aside the exparte decree was allowed and they were permitted to contest the suit, which would show the conduct of the defendants in leaving the suit exparte. The defendants knew pretty well that the instant transaction is only a sale transaction, however, they have resorted to protract the suit proceedings. Taking note of all the above aspects, the learned counsel for the respondent/plaintiff would contend that the learned single Judge has rightly decreed the suit and prayed for dismissing the appeal.

18. Heard the learned counsel appearing for the parties and we have given our anxious consideration to their submissions. We have also perused the materials available on record. As we have dealt with the factual matrix of the case in detail as above, we are refraining ourselves from reiterating the same any further in this appeal. However, for the purpose of disposal of this appeal, certain facts which are absolutely germane and necessary are reiterated hereunder.

19. It is the case of the plaintiff that the defendants 1 to 4 entered into sale agreement in respect of the suit property and the sale consideration was fixed at Rs.40 lakhs. The defendants also received Rs.20 lakhs as sale advance on the date of execution of agreement of sale on 27.05.2005. As per the plaint averment, the original documents of the suit property were handed over to the plaintiff on the same day. It was also contended in the plaint that the time fixed to complete the sale transaction was fixed as six months from the date of agreement. The plaintiff also contended that the defendants 1 to 4 further received a sum of Rs.15,47,000/- on various dates to meet their family expenses and debts and the last such payment was made on 07.09.2005. On receipt of the amount on 07.09.2005, the defendants have also made necessary endorsements on the reverse side of the agreement. Thus, the plaintiff totally paid a sum of Rs.35,47,000/- and the balance to be paid was Rs.4,53,000/-. Even though notice was sent to the defendants, they did not contest the suit and therefore, an exparte decree was passed. Pursuant to the exparte decree, the plaintiff has also remitted the balance amount to the credit of the suit. Thus, the plaintiff was always ready and willing to perform his part of the contract, but it was the defendants, who evaded and avoided to discharge their obligations under the contract.

20. Per contra, it is the case of the

appellants/defendants that the transaction between the parties is only a loan transaction and it is not sale transaction. Since the second defendant was in financial crunch, he availed the loan from HDFC Bank by offering the suit property as security and in order to prove that the transaction was only loan transaction, learned counsel for the appellants/ defendants invited the attention of this Court to the contradictions in the evidence of P.W.1. As contended by the learned Senior Counsel appearing for the appellants/ defendants, in the plaint, it has been stated that the documents were handed over to the plaintiff at the time of execution of the sale agreement, but in cross-examination, the plaintiff admitted that the original documents were agreed to be delivered to him especially when the documents were with the Bank and he promised to hand over the documents within two or three days and accordingly, after discharging the debt, the documents were handed over to the defendants, who in turn handed over the original documents to the plaintiff. Further, as per the plaint averments, when the plaintiff enquired about the quantum of debt payable to the Bank, the first defendant told that he had to pay Rs.20 lakhs to the Bank and so he required Rs.20 lakhs as sale advance. Thus, only at the time of signing the agreement of sale, when the plaintiff asked for the original documents, the first defendant informed the plaintiff that the original documents were mortgaged with the Bank.

21. On a careful perusal of the sale agreement Ex.P-1, we find that the words "மூல ஆவணங்களை இன்று தங்களிடம் கொடுத்துவிட்டேன்" (returned the parent documents today to you) were typed in a different typewriter. On the date of agreement, according to the plaintiff, after discussion relating to the liability to the bank, the first defendant received Rs.20 lakhs from him and made an endorsement to the effect that he has received Rs.20 lakhs as advance. Even in all the five endorsements, it has been stated that they are receiving the amount only for their family expenses and also to clear their debts. Such an endorsement made by the defendants raises a serious doubt as regards the nature of transaction entered into between the parties. If it is really a sale transaction, as contended by the plaintiff, there is no need to mention that the defendants are in need of money to meet their urgent family expenses and to discharge their family debts. Normally, it would have been mentioned that the amount is received towards part of sale consideration. Further, in the sale agreement, there is a clause to the effect that the amount will be repaid with 24% interest if the appellants/defendants fail to execute the sale deed. This further creates suspicion as to the nature of transaction entered into between the parties. If it is a sale transaction, the question of repayment of the amount with interest to the plaintiff will not arise, instead, the parties could have stated

that in the event of failure by any one of the parties, the other party can resort to specific performance of the contract between them. Further, from the evidence of P.W.1/plaintiff, it is not clearly established that the transaction between the parties was only for purchase of the suit property especially when it is contended by the defendants that the transaction is only a loan transaction.

22. It is well settled legal principle that under Section 20(1) of the Specific Relief Act, the jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so. The discretion to be exercised by the Court should not be arbitrary, but based on sound reasoning guided by judicial principles and capable of correction by a Court of appeal. In this regard, learned counsel for the appellants/defendants relied on a decision of the Supreme Court reported in 2017 (5) SCC 178 = 2017 SCC Online SC 157 (Jayakantham and others Vs. Abaykumar), wherein the Apex Court held as follows:

"7. While evaluating whether specific performance ought to have been decreed in the present case, it would be necessary to bear in mind the fundamental principles of law. The court is not bound to grant the relief of specific performance merely because it is lawful to do so. Section 20(1) of the Specific Relief Act, 1963 indicates that the jurisdiction to decree specific performance is discretionary. Yet, the discretion of the court is not arbitrary but is "sound and reasonable", to be "guided by judicial principles". The exercise of discretion is capable of being corrected by a court of appeal in the hierarchy of appellate courts. Sub-section (2) of Section 20 contains a stipulation of those cases where the court may exercise its discretion not to grant specific performance. Sub-Section (2) of Section 20 is in the following terms :

"Section 20 (2). The following are cases in which the court may properly exercise discretion not to decree specific performance-- (a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on

the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff;

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance."

8. However, Explanation 1 stipulates that the mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, will not constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b). Moreover, Explanation 2 requires that the issue as to whether the performance of a contract involves hardship on the defendant has to be determined with reference to the circumstances existing at the time of the contract, except where the hardship has been caused from an act of the plaintiff subsequent to the contract.

9. The precedent on the subject is elucidated below :

9.1. In Parakunnan Veetill Joseph's Son Mathew Vs. Nedumbara Kuruvila's Son, AIR 1987 SC 2328 : 1987 Supp SCC 340, this Court held that (SCC page 345, para 14):

"...14. Section 20 of the Specific Relief Act, 1963 preserves judicial discretion of Courts as to decreeing specific performance. The Court should meticulously consider all facts and circumstances of the case. The Court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The Court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff. ..."

9.2. A similar view was adopted by this Court in Sardar Singh Vs. Smt. Krishna Devi, (1994 (4) SCC 18) (SCC page 26 para 14):

"...14. Section 20(1) of the Specific Relief Act, 1963 provides that the jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief, merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. The grant of relief of specific performance is discretionary. The circumstances specified in Section 20 are only illustrative and not exhaustive. The court would take into consideration the circumstances in each case, the conduct of the parties and the respective interest under the contract."

9.3. Reiterating the position in K.Narendra Vs. Riviera Apartments (P) Ltd, (1999 (5) SCC 77), this Court held thus (SCC page 91, para 29):

"29. Performance of the contract involving some hardship on the defendant which he did not foresee while non-performance involving no such hardship on the plaintiff, is one of the circumstances in which the court may properly exercise discretion not to decree specific performance. The doctrine of comparative hardship has been thus statutorily recognized in India. However, mere inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not constitute an unfair advantage to the plaintiff over the defendant or unforeseeable hardship on the defendant. The principle underlying Section 20 has been summed up by this Court in Lourdu Mari David Vs. Louis Chinnaya Arogiaswamy (1996 (5) SCC 589) by stating that the decree for specific performance is in the discretion of the Court but the discretion should not be used arbitrarily; the discretion should be exercised on sound principles of law

capable of correction by an appellate court."

9.4. These principles were followed by this Court in A.C.Arulappan Vs. Smt. Ahalya Naik, (2001 (6) SCC 600) with the following observations (SCC pages 604 and 606, para 7 & 15) :

"7. The jurisdiction to decree specific relief is discretionary and the court can consider various circumstances to decide whether such relief is to be granted. Merely because it is lawful to grant specific relief, the court need not grant the order for specific relief; but this discretion shall not be exercised in an arbitrary or unreasonable manner. Certain circumstances have been mentioned in Section 20(2) of the Specific Relief Act, 1963 as to under what circumstances the court shall exercise such discretion. If under the terms of the contract the plaintiff gets an unfair advantage over the defendant, the court may not exercise its discretion in favour of the plaintiff. So also, specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the court would desist from granting a decree to the plaintiff."

"15. Granting of specific performance is an equitable relief, though the same is now governed by the statutory provisions of the Specific Relief Act, 1963. These equitable principles are nicely incorporated in Section 20 of the Act. While granting a decree for specific performance, these salutary guidelines shall be in the forefront of the mind of the court."

9.5. A Bench of three Judges of this Court considered the position in Nirmala Anand Vs. Advent Corporation (P) Ltd. and

Ors., (2002 (8) SCC 146) and held thus (SCC page 150, para 6) :

"6. It is true that grant of decree of specific performance lies in the discretion of the court and it is also well settled that it is not always necessary to grant specific performance simply for the reason that it is legal to do so. It is further well settled that the court in its discretion can impose any reasonable condition including payment of an additional amount by one party to the other while granting or refusing decree of specific performance. Whether the purchaser shall be directed to pay an additional amount to the seller or converse would depend upon the facts and circumstances of a case. Ordinarily, the plaintiff is not to be denied the relief of specific performance only on account of the phenomenal increase of price during the pendency of litigation. That may be, in a given case, one of the considerations besides many others to be taken into consideration for refusing the decree of specific performance. As a general rule, it cannot be held that ordinarily the plaintiff cannot be allowed to have, for her alone, the entire benefit of phenomenal increase of the value of the property during the pendency of the litigation. While balancing the equities, one of the considerations to be kept in view is as to who is the defaulting party. It is also to be borne in mind whether a party is trying to take undue advantage over the other as also the hardship that may be caused to the defendant by directing specific performance. There may be other circumstances on which parties may not have any control. The totality of the circumstances is required to be seen."

10. In the present case, the material on the record contains several aspects which will have to weigh in the balance. There is no dispute about the fact that the father of the respondent who entered into an agreement on his behalf (and deposed in evidence)

carried on moneylending business. The consistent case of the appellants in reply to the legal notice, in the written statement as well as in the course of evidence was that there was a transaction of a loan with the father of the respondent. The evidence of DW2 was to the following effect :

"The defendant was having a relationship with plaintiff's father, Babu Dhanaraj in respect of loan transaction. Already the Defendant No.2 has taken loan from Babu Dhanapathy Raj and bought a lorry and was driving it. In this case, in order to return the loan of Rs. 1,00,000/- as per the instruction of Babu Dhanapathy Raj only on the basis of trust, Exhibit P1 agreement to sell was executed. In the said document, I have put my signature as a witness."

During the course of the evidence, the appellants produced material (Exhibit D3) indicating that the value of the property was Rupees six lakhs thirty thousand on 20.11.2006. The agreed consideration between the parties was rupees one lakh sixty thousand of which an amount of rupees sixty thousand was paid at the time of the execution of the agreement. The sale transaction was to be completed within three years against the payment of the balance of rupees one lakh. The appellants also relied upon Exhibit D2 which indicated the value of the property as on 1.4.1999. These aspects were adverted to in the judgment of the trial court and the first appellate court while setting out the evidence, but have evidently not been borne in mind in determining as to whether a decree for specific performance could judiciously have been passed.

11. In our view the material which has been placed on record indicates that the terms of the contract, the conduct of parties at the time of entering into the agreement and circumstances under which the

contract was entered into gave the plaintiff an unfair advantage over the defendants. These circumstances make it inequitable to enforce specific performance."

23. Learned counsel for the appellants also relied on the following decisions in support of his submissions and the relevant portion of the same is extracted hereunder:

(a) 2018 (6) CTC 689 (Mad) (Division Bench of Madras High Court) (G.Soundararajan Vs. S.A.Thooyamani):

"31. Thus, the respondent/plaintiff failed to prove the alleged lending of the loan under Exs.A-3 and A-4 promissory notes and also the alleged discharge as per the endorsements Exs.A-21 and A-22 made on the back of Exs.A-3 and A-4. In such circumstances, this Court is not bound to grant the relief of specific performance, merely because it is lawful to do so, as laid down by the Supreme Court in the decision reported in Parakunnam Veetill Joseph's son Mathew Vs. Nedumbara Kruvila's son and others, AIR 1987 SC 2328, wherein it was observed by the Apex Court that Section 20 of the Specific Relief Act preserves judicial discretion to Courts as to decreeing specific performance; the Court should meticulously consider all facts and circumstances of the case; the Court is not bound to grant specific performance merely because it is lawful to do so; the motive behind the litigation should also enter into the judicial verdict and the Court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff. In the case on hand, the respondent/plaintiff failed to prove the passing off of the consideration under Ex.A-2 sale agreement and thus, he is not entitled for the equitable relief of specific performance."

(b) 2012 (4) CTC 100 (Madras High Court) (Pappammal Vs. P.Ramasamy):

"23. In this case also, out of the total sale consideration of Rs.40,000/-, Rs.30,000/- was paid and for the payment of balance sum of Rs.10,000/- five year period was prescribed and therefore, in my opinion,

Ex.A-2 was not intended to be an Agreement of Sale and it must have been executed only as security or as a loan transaction.

24. As stated supra, the Appellant had proved that she had dealing with the Vetri Murugan Finance, by marking Ex.B-2 series, and the brother-in-law of the Respondent was also one of the Directors of Vetri Murugan Finance Company and he has also filed the suit for Specific Performance of Agreement of Sale and therefore, the Appellant has proved that preponderance of probabilities would only lead to the conclusion that Ex.A-2 was not intended to be acted upon as Agreement of Sale and it was given only as security or as loan transaction.

26. Even assuming that Ex.A.2 was intended to be acted upon as agreement of sale, as contended by the respondent, we will have to see whether the respondent is entitled to the relief of specific performance. It is a settled legal position of law that in all cases of specific performances, the plaintiff must plead and prove that he is ready and willing to perform his part of the contract and there is no laches on his part in approaching the Court. The plaintiff must come to the Court, within a reasonable time and must prove that he has got means to pay the balance sale consideration. In this case, the respondent/plaintiff has admitted in evidence that five years period was provided, as he was not having means to pay Rs.10,000/- immediately. Therefore, having regard to the admission of the respondent that on the date of the agreement of sale he was not having means to pay Rs.10,000/-and a reading of clause in the agreement of sale would make it clear that the respondent can enforce the specific performance of the agreement at any time within the period of five years. It is only stated in the agreement of sale that if the respondent/plaintiff is prepared to pay the balance sale consideration at any time between 06.05.1996 and 06.05.2001 and inform the appellant/defendant to receive the

amount and execute the sale deed, the appellant/defendant should come and execute the sale deed, failing which, the respondent/ plaintiff would enforce the agreement, by filing a suit. In the agreement, he would admit that he did not register the sale agreement, as he was not having sufficient finance. He further admitted that six months, after the agreement of sale was executed, he approached the appellant and requested her to execute the sale deed and 3 or 4 times, he demanded the appellant to execute the sale and the appellant did not give any reply. The respondent mobilized Rs.10,000/- within a period of six months, and thereafter, he asked the appellant to execute the sale deed and the appellant did not cooperate. The respondent further admitted that no action was taken by him till date he sent notice on 26.1.2000 and reason for not filing the suit immediately was that 5 year period was provided in the agreement of sale."

(c) 2016 (6) CTC 225 (Madras High Court) (Rajammal Vs. M.Senbagam) :

"15. It is true that the defendants admitted the execution of sale agreement. Hence, the question that would arise next is as to whether the defendants, having admitted the execution of the sale agreement, can take such defense and whether such defense is not hit by Section 92 of the Indian Evidence Act ? 22. Even otherwise assuming that the suit agreement is intended to be acted upon, the plaintiff is not entitled to the relief automatically unless she crosses the hurdle of pleading and proving the readiness and willingness. Now, the question that would arise is whether the plaintiff has discharged such statutory obligation of pleading, proving and establishing her readiness and willingness ? Such mandatory requirement under Section 16 (c) of the Specific Relief Act is to be complied with by the plaintiff, even in the absence of any objection or question raised by the defendants in their pleading."

(d) MANU/SC/0173/1987 = AIR 1978 SC 2328 = 1987 Supp SCC 340 (Parakunnan Veetill Joseph's son Mathew Vs. Nedumbara Kuruvila's son and others):

"14. Section 20 of the Specific Relief Act, 1963 preserves judicial discretion to Courts as to decreeing specific performance. The Court should meticulously consider all facts and circumstances of the case. The Court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The Court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff. . . ."

24. From the decisions cited supra and in the light of the factual aspects of the case, we are of the opinion that there is a sale agreement between the parties and considering the various circumstances and admission of P.W.1 and the contradiction found in his evidence with that of the plaintiff's averments, we are of the view that the intention between the parties is to engage themselves in a loan transaction and at no stretch of imagination the transaction between the parties could be construed as a sale transaction. During the loan transaction, the defendants have executed agreement of sale purportedly towards security for prompt repayment of the loan amount or in the event of any default by the defendants, the plaintiff could secure the amount so advanced to the defendants with the security made available by the defendants in the form of deposit of title deeds of the suit property. We reiterate that if it is a sale transaction, the defendants need not make all endorsements to the effect that in order to meet the urgent family expenses etc., Further, in one of the clauses contained in the agreement, it is stated that in the event of failure, the plaintiff is entitled for payment of the amount with interest. If really it is a sale transaction, the recital would have been to the effect that the sale advance already paid will be forfeited in the event of failure by the purchaser. In a sale transaction, the endorsement of this nature will be made very rarely. Therefore, we are of the opinion that the plaintiff failed to establish beyond doubt that the transaction is a sale transaction warranting a decree for specific performance in his favour. The respondent/plaintiff has not established the entire gamut of his claim and his case is shrouded by mystery and suspicion, and therefore, this is not a fit case to exercise the equitable and discretionary relief of specific performance. Further, as on the date of agreement, according to the records,

the value of the property is Rs.60 lakhs, in the sale agreement it was mentioned only as Rs.40 lakhs and accordingly the parties have agreed to enter into sale transaction only for Rs.40 lakhs. Moreover, in the sale agreement, the property is mentioned as though on the date of agreement of sale, advance amount was paid and it is admitted in the cross-examination of the plaintiff that he had deposited the amount in the Bank.

25. Above all, during the course of arguments, the learned counsel for the defendants/appellants agreed to repay the amount received from the plaintiff especially when the defendants/appellants did not dispute the receipt of the amount from the plaintiff in this case. Therefore, as conceded by the learned counsel for the appellants/defendants, the appellants/defendants are directed to refund the amounts paid by the plaintiff/respondent with interest at the rate of 24% per annum from the date of plaint till the date of payment.

26. In the result, the judgment and decree dated 10.12.2012 passed in C.S.No. 923 of 2005 on the file of this Court is set aside. The Original Side Appeal is allowed. Consequently, the suit in C.S. No. 923 of 2005 stands dismissed in so far as it relates to the prayer for specific performance sought for by the plaintiff, instead, the plaintiff is entitled to receipt of the amount paid to the defendants and the defendants are directed to refund the sum of Rs.40 lakhs received from the plaintiff with interest at the rate of 24% per annum from the date of plaint till realisation. There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/--
Assistant Registrar

//True Copy//

Sub Assistant Registrar

cs/rsh

TO

The Sub Assistant Registrar,
High Court, Madras-104.

+2cc to Mr.M.Chinnasamy, Advocate, S.R.No.26644
+1cc to Mr.D.Ravichander, Advocate, S.R.No.26645

O.S.A.No.13 of 2014

PPA (CO)
GN(28/05/2019)